

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re:)	
)	
Transaction Network Services, Inc.,)	CC Docket No. 95-155
TSYS Acquiring Solutions, LLC, and)	
Electronic Payment Systems, LLC)	
)	
Regarding FCC Jurisdiction and)	
RespOrg Responsibilities to Comply)	
with Part 52 of the FCC's Rules and)	
the SMS/800 Tariff Requirements)	
To: The Commission		

**MOTION TO STRIKE AND OPPOSITION TO
MOTION FOR LEAVE TO EXCEED PAGE LIMITS**

TSYS ACQURING SOLUTIONS, LLC

Scott R. Flick
Glenn S. Richards

Its Counsel in this Matter

PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Dated: May 10, 2011

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Summary

TSYS Acquiring Solutions, LLC (“TSYS”), by its counsel, hereby moves to strike the “Reply Regarding Its Application for Review” (“EPS Reply”) and any related arguments submitted by Electronic Payment Systems, LLC (“EPS”) in this proceeding, and opposes EPS’s “Motion for Leave to Exceed Page Limits” with regard to that document. The EPS Reply was filed late, and more importantly, violates Section 1.115(c) of the Commission’s Rules (raising questions of fact or law not presented to the Bureau below) and Section 1.115(d) (discussing matters not raised in TSYS’s Opposition to the EPS Application for Review). It is only the inclusion of this improper additional material that makes the EPS Reply so lengthy, thereby creating a violation of the Commission’s page limit for replies as well.¹ For the reasons discussed below, the EPS Reply should therefore be dismissed, and EPS’s belatedly-raised questions of fact and/or law, as well as other matters improperly introduced by EPS on appeal, should be disregarded.

¹ See 47 C.F.R. § 1.115(f).

I. The EPS Reply Improperly Raises Matters That EPS Failed to Present to the Bureau and Which Are Not Responsive to TSYS's Opposition

Section 1.115 of the Commission's Rules is designed to promote the fair and efficient processing of applications for review. Section 115(f) limits applications for review and oppositions thereto to 25 pages, and where the rules permit a reply, limits that reply to 5 pages.² Section 1.115(c) limits the permitted content of appeal documents, providing that: "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."³ Finally, Section 1.115(d) specifically limits the content of a reply, requiring that replies "be limited to matters raised in the opposition."⁴ EPS has violated all three of these rules, and the violation is so extreme as to be apparent from even a cursory review.

EPS's sole filing before the Bureau below (the "EPS Opposition") was **9** pages of text with a copy of the modified court order from Arizona (ordering the transfer of the toll free numbers to EPS) that had already been submitted to the Commission by TSYS.⁵ The EPS Opposition included no other documents or declarations supporting EPS's factual assertions.⁶ When the Bureau rejected EPS's arguments in the Declaratory Ruling,⁷ EPS filed an **11**-page Application for Review that included no declarations or other supporting attachments. Subsequent to that filing, as obliquely noted in the EPS Reply,⁸ the U.S. District Court in Arizona responded to the Bureau's Declaratory Ruling by staying its earlier order requiring the transfer of the seven TSYS toll free numbers to EPS. In its order, the court noted EPS's filing of

² 47 C.F.R. § 1.115(f).

³ 47 C.F.R. § 1.115(c).

⁴ 47 C.F.R. § 1.115(d).

⁵ See Exhibit 1 hereto (a copy of the EPS Opposition's Table of Contents).

⁶ See EPS Opposition (filed Feb. 23, 2011).

⁷ See *Transaction Network Services, Inc., TSYS Acquiring Solutions, LLC, and Electronic Payment Systems, LLC*, 52 CR 670 (WCB 2011) (the "Declaratory Ruling").

⁸ EPS Reply at n.6.

an Application for Review, and indicated the stay would remain in place “pending the resolution of EPS’s petition before the Commission.”⁹

Recognizing that its gambit to use the court in Arizona to circumvent the FCC had failed, EPS suddenly focused its attention on its Application for Review. In contrast to its earlier filings, and despite the Commission’s 5-page limit on replies, the text of the EPS Reply is more than double that page limit (**11** pages), and then proceeds to include an additional **97** page attachment. As a result, the EPS Reply is three times longer than all of its prior filings before the Bureau *and* the Commission *combined*.

Rather than serve the intended purpose of distilling for the Commission the principal points of disagreement, the EPS Reply does the opposite, seeking to expand the breadth of the appeal beyond matters presented to the Bureau below, in violation of Section 1.115(c), and beyond matters discussed in TSYS’s Opposition to the EPS appeal, in violation of Section 1.115(d).

It is apparent on its face that a 108-page reply has not limited itself to the “questions of fact and law” that EPS was able to present to the Bureau below in the 9-page EPS Opposition, much less to the specific “matters raised” in TSYS’s Opposition to the EPS Application for Review. As stated in *Gross Telecasting, Inc.* with regard to Section 1.115(d):

Reply pleadings, which contain wholly new and previously unmentioned allegations of fact and/or requests for additional issues will not be considered. To do otherwise would permit the reply to serve the purpose of the original petition and thereby, inter alia, preclude another party from responding to the allegations.¹⁰

⁹ *TSYS Acquiring Solutions, LLC v. Electronic. Payment Systems, LLC*, Order, Doc. 123 in Case No. 2:09-CV-09-0155-JAT (D. Ariz. 2011), at 3.

¹⁰ 49 FCC 2d 56 (Rev. Bd. 1974), at n.8 (citing *Industrial Business Corporation*, 40 FCC 2d 69 (1973)). See also *Catholic Social Club of Putnam County Tennessee, Inc.*, DA 11-600 (MB April 4, 2011), at n.38 (“We will not, however, address this allegation because it constitutes impermissible ‘new matter’ that is not sufficiently related to matters raised in the CSC Opposition.”).

In turn, *Gross Telecasting* cites *Industrial Business Corporation*, which states that “[t]o allow the reply to thus serve the purpose of the original petition would be to . . . effectively render meaningless provisions in the rules for a fair opportunity by another party to respond to allegations”¹¹

Section 1.115(c) is grounded in similar notions of Commission efficiency and fairness. As the Commission stated in *National Science and Technology Network, Inc.*:

Section 1.115(c) of the Commission’s Rules, however, specifically prohibits grant of an application for review that relies on questions that the designated authority has been afforded no opportunity to consider. “[T]he Commission has reiterated that a party may not ‘sit back and hope that a decision will be in its favor, and then, when it isn’t, to parry with an offer of more evidence.’”¹²

Yet that is precisely what EPS seeks to do in the EPS Reply. Rather than attempt to catalog the new questions of fact and law EPS is seeking to now raise, it is frankly easier for the Commission to catalog the far smaller number of issues actually raised before the Bureau by EPS, and to note that *any other matters* raised on appeal are barred from consideration by Section 1.115(c). More specifically, Section 1.115(c) flatly prohibits grant of the EPS Application for Review “if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”¹³

Attached hereto as Exhibit 1 is a copy of the EPS Opposition’s Table of Contents indicating the four principal arguments EPS presented for the Bureau’s consideration:

1. “Transfers are not completely barred, particularly under the circumstances of the present case.”
2. “The transfer of the 1-800 numbers does not involve hoarding or brokering.”

¹¹ *Industrial Business Corporation*, 40 FCC 2d 69 (1973), at ¶ 4.

¹² 44 FCC Rcd 3214 (2008), at ¶ 13 (footnotes omitted) (*quoting Improving Public Safety Communications in the 800 MHz Band*, 20 FCC Rcd 1560, 1562 n.21 (2005) (*which quotes Colorado Radio Corp. v. FCC*, 118 F.3d 24, 26 (D.C. Cir. 1941))).

¹³ 47 C.F.R. § 1.115(c)

3. “EPS acted properly in protecting what it contracted for and was awarded.”
4. “It is premature for the FCC to address the assignment of TSYS’ subscriber interest to EPS.”¹⁴

EPS has largely dropped the last two issues as moot in light of the Bureau’s Declaratory Ruling, which means that the only two issues raised by EPS on which the Bureau has had an opportunity to pass is EPS’s claim that (1) transfers of toll free numbers are not completely barred; and (2) the transfer of the toll free numbers to EPS would not involve hoarding or brokering. Belatedly raising at this late date, in the EPS Reply or otherwise, any other matter not presented to the Bureau in the EPS Opposition is prohibited by Section 1.115(c). Moreover, to the extent the EPS Reply raises matters that are not responsive to TSYS’s Opposition, it violates Section 1.115(d) also.

Examples of material presented in the EPS Reply that violate one or both of these prohibitions include:

- *A prohibition on transfers would conflict with “standard industry practice.”*¹⁵ (Violates Section 1.115(c) – not raised before Bureau, and Section 1.115(d) – not discussed in the TSYS Opposition).
- *A prohibition on transfers would conflict with case law, specifically Ford Motor Co. v. United States Auto Club, 2008 U.S. Dist. LEXIS 74198 (Tex. Dist. 2008).*¹⁶ (Violates Section 1.115(c) – not raised before Bureau (*Ford Motor Co.* not even mentioned in EPS Opposition)).
- *A prohibition on transfers would impose a “huge burden” on the FCC, commerce, and the economy.*¹⁷ (Violates Section 1.115(c) – not raised before Bureau, and Section 1.115(d) – not discussed in the TSYS Opposition).
- *In an act of “unmitigated hypocrisy,” TSYS itself previously violated the prohibition on toll free number transfers when it acquired three of the toll free numbers from VITAL.*¹⁸ (Violates Section 1.115(c) – allegation of fact not raised before Bureau, and Section

¹⁴ See Exhibit 1.

¹⁵ EPS Reply at 1-2, 5-6, 7, 10.

¹⁶ EPS Reply at 2, 6-7.

¹⁷ EPS Reply at 1-2, 5, 10.

¹⁸ EPS Reply at 2, 4, 5 (quoted material at 2).

1.115(d) – not discussed in the TSYS Opposition). The Commission should also be made aware that this assertion is based upon a false premise – no such transfer ever occurred, as VITAL and TSYS are the same company, having merely undergone a name change).

- *TSYS “is using the FCC processes to refuse to move the non-EPS merchants to different numbers, which is not properly an issue of FCC concern as it has nothing to do with number assignment.”*¹⁹ *“The Commission should make it clear that its ruling is not intended to interfere with the remedy awarded by the Court to separate the EPS traffic from the non-EPS traffic.”*²⁰ (Violates Section 1.115(c) – questions of fact and law not raised before Bureau, and Section 1.115(d) – not discussed in the TSYS Opposition).
- *“TSYS submitted false declarations to the Court, stating there was only one RespOrg providing only three toll free numbers, when in fact there were two RespOrgs providing at least seven numbers.”*²¹ (Violates Section 1.115(c) – allegation of fact not raised before Bureau, and Section 1.115(d) – not discussed in the TSYS Opposition).
- *The “industry numbering guidelines for 855 numbers expressly recognize [transfers], requiring only after-the-fact notices of changes in subscriber of record names.”*²² (Violates Section 1.115(c) – not raised before Bureau).

Many of these examples also contain new allegations of subsidiary “facts” to support them, further aggravating the extent to which the EPS Reply violates Section 1.115. Indeed, to the extent that EPS did not support any of its factual assertions before the Bureau (or even in its Application for Review) with a declaration of personal knowledge, all of EPS’s factual assertions at this late date are novel for practical purposes. Stated simply, EPS is venturing far beyond the only two pertinent issues it raised before the Bureau below: (1) its assertion that transfers of toll free numbers are not completely barred, and (2) its claim that the transfer of the toll free numbers here does not involve hoarding or brokering. Wherever EPS has sought to move beyond those two issues on appeal, it has done so in violation of Section 1.115(c).

¹⁹ EPS Reply at 3, 7-8 (quoted material at 8).

²⁰ EPS Reply at 3, 8-9 (quoted material at 8). It should be noted that EPS lacks standing to make this request in any event, as the court in Arizona has already stayed the underlying order pending the outcome of EPS’s Application for Review, thereby mooting the question. *See TSYS Acquiring Solutions, LLC v. Electronic. Payment Systems, LLC*, Order, Doc. 123 in Case No. 2:09-CV-09-0155-JAT (D. Ariz. 2011).

²¹ EPS Reply at 7, 9 (quoted material at 9).

²² EPS Reply at 6-7 (quoted material at 6).

In addition, far from being responsive to TSYS's Opposition, as required by Section 1.115(d), many of the matters discussed in the EPS Reply are merely points EPS wants to belatedly insert into the record without an opportunity for TSYS to respond. The Commission's immediate remedy for the inclusion of such content in a reply is outlined in *Industrial Business Corporation*, where the Commission stated that "OBC's reply pleading, to the extent it contains wholly new and previously unmentioned allegations of fact, will be dismissed."²³

Exclusion from the record is particularly appropriate where the new matters being raised by EPS are so numerous and inextricably intertwined with its remaining assertions as to make separating them challenging and time-consuming for the Commission. In these circumstances, the wisdom of Section 1.115(c)'s blanket prohibition on granting applications for review that rely upon "questions of fact or law upon which the designated authority has been afforded no opportunity to pass" is apparent.²⁴ The EPS Application for Review cannot be granted in compliance with Section 1.115(c), and the EPS Reply and any related arguments should be stricken as violating Section 1.115(c) and/or Section 1.115(d). *See Henrico Count School District*, 17 FCC Rcd 24237 (2002), at ¶ 6 ("Accordingly, because Henrico did not raise these factual and legal questions in its Request for Review before the Bureau, consideration of these arguments by the Commission is precluded by section 1.115(c)."); *King and Queen County Public Schools*, 18 FCC Rcd 2303 (2003), at ¶ 9 ("King and Queen's assertion of inconsistent enforcement was not presented to the Bureau, and it will therefore not be considered.").

²³ 40 FCC 2d 69 (1973), at ¶ 4. *Cf. Lexington County Broadcasters, Inc.*, 40 FCC 2d 320 (Rev. Bd. 1973), at n.9 ("To allow the supplement to serve the purpose of the original petition effectively renders meaningless the provisions in the Rules intended to provide a fair opportunity for another party to respond to allegations, and to avoid a proliferation of unauthorized pleadings. Orderliness, expedition and fairness on the adjudicatory process require that reasonable procedural limits be established and maintained." (citations omitted)).

²⁴ 47 C.F.R. § 1.115(c).

II. There Is No Legitimate Basis for EPS's Motion to Exceed the Page Limits Established by Section 1.115(f) of the Commission's Rules

Realizing that the number of new matters it wished to introduce into the record would never fit within the Commission's 5-page limit, EPS did not even attempt to pare down its arguments to 5 pages. Instead, it submitted an 11-page reply with 97 pages of attachments, and filed a "Motion for Leave to Exceed Page Limits" ("EPS Motion"). The sole reason given in the EPS Motion for exceeding the page limit established by Section 1.115(f) of the Commission's Rules is that oppositions were filed by both TSYS and Transaction Network Services, Inc. ("TNS"), therefore requiring EPS to respond to "over 30 pages of TSYS and TNS responses."²⁵

However, that argument fails even cursory scrutiny. First, the page limit for oppositions under Section 1.115(f) is 25 pages, with 5 pages allotted by the Commission as adequate to reply to oppositions of that length. Here, the TSYS Opposition was 20 pages, and the TNS Opposition 11 pages. As a result, EPS is arguing that because it must reply to 31 combined pages of oppositions rather than to 25 pages, it needs more than double the permitted number of pages to do so. EPS makes this claim despite conceding in the EPS Motion that "[t]here is some overlap in the issues raised by TSYS' and TNS' responses."²⁶ Clearly, EPS cannot plausibly claim that it needs to more than double the permitted page limit in order to respond to an extra six pages of oppositions, particularly where it admits that the two oppositions raise similar arguments.

Second, EPS's claim to need more than double the permitted pages in order to file a "consolidated reply" is a sham. A review of the EPS Reply reveals that *the TNS Opposition is not mentioned in the EPS Reply even once*. In fact, there are only six references to TNS in the text of the EPS Reply, and they are factual allegations about the conduct of TNS – allegations that are generally in violation of Section 1.115(c)'s prohibition on making new factual

²⁵ EPS Motion at 2.

²⁶ *Id.*

allegations on appeal.²⁷ Of those six mentions, *four* of them are repetitive assertions that TNS cooperated with TSYS to earlier transfer toll free numbers from VITAL to TSYS. As noted above, that claim is both false (VITAL and TSYS are the same company) and a violation of Section 1.115(c), as EPS failed to present that factual allegation to the Bureau for consideration.

Thus, EPS is being disingenuous in claiming that it needs more than double the permitted pages to file a consolidated reply, *as there is no consolidated reply*. Instead, EPS seeks to file its lengthy reply solely to respond to the 20-page TSYS Opposition. As the TSYS Opposition is well below the Commission's 25-page limit, there is no basis for permitting EPS to exceed the normal 5-page limit to respond to it, and certainly no reason to more than double that limit.

Third, once EPS's fiction of a "consolidated reply" is stripped away, the EPS Motion presents no other basis for permitting an extended reply. It is apparent that the real and sole reason for an extended reply is merely to permit EPS to present extensive additional material to the Commission in violation of Sections 1.115(c) and (d). However, a desire for additional pages to more thoroughly violate the Commission's Rules is not a basis for the requested waiver. It may be a basis for sanctions for abuse of the Commission's processes, but not for a waiver. If the EPS Reply is not dismissed outright for violating Sections 1.115(c) and (d), the EPS Motion should be denied as baseless, and the EPS Reply dismissed as a violation of Section 1.115(f).

III. In Addition to Its Numerous Other Defects, the EPS Reply Was Filed Late

While perhaps one of the lesser floats in EPS's parade of rule violations, it is worth noting that EPS also filed its reply late, in violation of Section 1.115(d). That subsection provides that "replies to oppositions shall be filed within 10 days after the opposition is filed and shall be limited to matters raised in the opposition."²⁸ TSYS filed its Opposition on April 8,

²⁷ See, e.g., EPS Reply at 5 ("TNS transferred VITAL's subscriber interest to TSYS without FCC approval . . .").

²⁸ 47 C.F.R. § 1.115(d).

2011, and served EPS by mail. Pursuant to Section 1.4 of the Commission's Rules, the deadline for EPS to file a reply to TSYS's Opposition was therefore April 21, 2011.²⁹ EPS failed to file its reply by that deadline. Instead, the EPS Reply was not filed until April 25, 2011. To the extent that EPS might seek to argue that an April 25th filing would have been timely with regard to a reply to the TNS Opposition, that is not relevant to replying to the TSYS Opposition, and as noted above, the EPS Reply does not address the TNS Opposition in any event.

As a result, the EPS Reply is also late-filed, apparently because EPS required the extra time to write an 11-page reply with a 97 page attachment. This provides yet one more reason the EPS Reply should be rejected. As the Commission stated in *JNE Investments, Inc.*, where a party filed its responsive pleading five days late,

[w]hen, as here, a potential participant determines that there is insufficient time to file a timely responsive pleading and that fewer than seven days remain until that pleading's due date, the participant must file a motion for extension of time by the due date and (in addition to serving a copy on the parties) orally notify all parties and the Commission staff of its motion. Multicultural has not followed those procedures nor explained why it could not do so. Accordingly, we deny Multicultural's waiver request and dismiss its Opposition to JNE's Petition for Reconsideration.³⁰

EPS's failings here are identical to those the Commission found sufficient to merit dismissal for late-filing in *JNE Investments, Inc.*, and the party in *JNE Investments, Inc.* was not carrying the baggage of additional rule violations found in the EPS Reply here. For this additional reason, the EPS Reply should be dismissed.

²⁹ 47 C.F.R. § 1.4.


³⁰ 23 FCC Rcd 623 (2008), at ¶ 14 (citing 47 C.F.R. § 1.46(c)). *See also Federal-State Joint Board on Universal Service*, 21 FCC Rcd 14931 (WCB 2006), at ¶ 10 ("Mid-Tex's only excuse for its late filing was its confusion over the deadline. Such an excuse does not constitute special circumstances.") (footnote omitted).

Conclusion

For the reasons stated herein, the EPS Motion is baseless and should be denied, requiring dismissal of the EPS Reply. Moreover, the EPS Reply and matters raised therein have been presented in this proceeding in violation of multiple provisions of the Commission's Rules. EPS's extensive violations of Sections 1.115(c) and (d) of the Commission's Rules provide multiple independent grounds for striking or dismissing the EPS Reply and any related arguments improperly introduced by EPS on appeal. As the Commission has stated, "Section 1.115(c) of the Commission's Rules . . . specifically prohibits grant of an application for review that relies on questions that the designated authority has been afforded no opportunity to consider. The Commission has reiterated that a party may not sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence."³¹ That is precisely what EPS is seeking to do here, and that effort must be soundly rejected by the Commission.

Respectfully submitted,

TSYS ACQUIRING SOLUTIONS, LLC

By: 
Scott R. Flick
Glenn S. Richards

Its Counsel in this Matter

PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W
Washington, D.C. 20037
(202) 663-8000

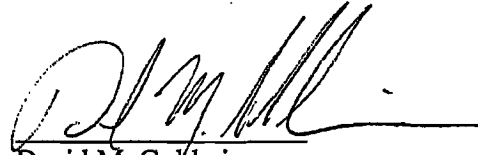
Dated: May 10, 2011

³¹ *National Science and Technology Network, Inc.*, 44 FCC Rcd 3214 (2008), at ¶ 13 (footnotes and internal quotation marks omitted) (quoting *Improving Public Safety Communications in the 800 MHz Band*, 20 FCC Rcd 1560, 1562 n.21 (2005) (which quotes *Colorado Radio Corp. v. FCC*, 118 F.3d 24, 26 (D.C. Cir. 1941))).

Declaration of David M. Goldwin

I, David M. Goldwin, do hereby declare under penalty of perjury that the following is true and correct:

1. I am the Senior Associate General Counsel of TSYS Acquiring Solutions, LLC. In that position, I have been extensively involved in the company's dealings with Electronic Payment Systems, LLC.
2. I have reviewed the attached "Motion to Strike and Opposition to Motion for Leave to Exceed Page Limits." Except for (a) matters cited therein contained in the FCC's records, (b) matters for which other support is provided, and (c) matters of which the Commission may take official notice, the facts set forth therein are true and correct to the best of my personal knowledge and belief.


David M. Goldwin

Dated: May 9, 2011

EXHIBIT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re:

Transaction Network Services, Inc., TYSY
Acquiring Solutions, LLC and Electronic
Payment Systems, LLC

Regarding FCC Jurisdiction and RespOrg
Responsibilities to Comply with Part 52 of
the FCC's Rules and the MS/800 Tariff
Requirements

CC Docket No. 95-155

To: Office of the Secretary
Attn: Chief, Wireline Competition Bureau

ELECTRONIC PAYMENT SYSTEMS, LLC'S OPPOSITION
TO TSYS' PETITION

Scotty P. Krob
Attorney at Law
8400 E. Prentice Avenue
Penthouse
Greenwood Village, CO 80111
(303) 694-0099

February 23, 2011

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CERTIFICATE OF SERVICE

I, Cherie L. Mills, a secretary with the law firm of Pillsbury Winthrop Shaw Pittman LLP, hereby certify that a copy of the foregoing **"MOTION TO STRIKE AND OPPOSITION TO MOTION FOR LEAVE TO EXCEED PAGE LIMITS"** was served via first class U.S. mail, postage pre-paid, on this 10th day of May, 2011, to the following:

Scotty P. Krob
Attorney at Law
8400 E. Prentice Avenue, Penthouse
Greenwood Village, CO 80111
Counsel to Electronic Payment Systems, LLC

Jim McLaughlin
General Counsel
Transaction Network Services, Inc.
11480 Commerce Park Drive
Suite 600
Reston, VA 20191

Thomas J. Navin
Thomas R. McCarthy
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
Counsel to Transaction Network Services, Inc.



Cherie L. Mills